IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 15158 of 2004
AND
SPECIAL CIVIL APPLICATION No 15163 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ISHVERBHAI SHANABHAI MACHHI

Versus

SHATVANT REDDY, ADDL.SECRETARY

Appearance:

1. Special Civil Application No. 15158 of 2004
MR BK OZA for Petitioner No. 1
M IA SHAIKH for Respondent No. 1-2
MR HM PRACHCHHAK, AGP for Respondent No. 3-5

2. Special Civil Application No. 15158 of 2004
MR BK OZA for Petitioner No. 1
M IA SHAIKH for Respondent No. 1-2
MRS HB PUNANI AGP for Respondent No. 3-5

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 04/02/2005

COMMON ORAL JUDGEMENT

1. Both the petitioners of the above mentioned petitions have challenged the order of detention passed separately by District Magistrate, Vadodara on 13th October, 2004 under powers conferred upon him by Section 3(2) of the Prevention of Black Marketing Commodities

Act, 1980 ["P.B.M. Act" for short]. Both the petitioners are under detention in pursuance of the above said order from 14th October, 2004. Two separate detention orders though came to be passed by the District Magistrate, Vadodara against both the above petitioners, but the transaction relating in passing of detention order is the same, therefore, both the petitions were heard together and are being disposed of by a common order.

2. According to the brief facts of the case, the officials of Pandu Police Station, Taluka: Savali were in patrolling on 3rd September, 2004 and during this patrolling, they found at about 1.00 A.M. that one three wheelers tempo bearing No.GJ-6-V-8426 was going towards village Varsada from village Kothara. The said three wheelers tempo was checked by the police. It was found that the tempo was loaded with blue kerosene to the extent of 400 ltrs. The driver of the tempo one Rameshbhai Chhotabhai Machhi stated that this bulk of kerosene was loaded in the said tempo by Balabhai Raijibhai Machhi from the rationing shop of Ishverbhai Shanabhai Machhi situated at village Kothara.

3. The petitioner Balabhai Raijibhai Machhi has preferred Special Civil Application No.15163 of 2004 challenging his detention order and Ishverbhai Shanabhai Machhi has preferred Special Civil Application No.15158 of 2004 challenging his detention order, as aforesaid.

4. Therefore, as per the allegations, the petitioner - Balabhai Raijibhai Machhi obtained supply of blue kerosene from the petitioner - Ishverbhai Shanabhai Machhi from his rationing shop situated at Kothara. Thus, in conspiracy to disturb the system of public distribution, both the petitioners associated in selling blue kerosene in open market with higher price then the price fixed by the Government at subsidies rates. The blue kerosene was to be distributed by the Ration Shop holder to certain class of persons with subsidied rates as per the conditions of license granted to him. It was also alleged that in past also 4-5 times, petitioner Balabhai Raijibhai Machhi obtained supply of blue kerosene from petitioner Ishwarbhai Shanabhai Machhi. Thereafter a checking about the record kept by the petitioner Ishverbhai Shanabhai Machhi, was also conducted and it was found that by preparing bogus bills, petitioner - Ishverbhai Shanabhai Machhi, holding license for rationing shop had disposed of wheat, rice and kerosene for higher price in open market, which were required to be distributed among certain class according

to conditions of the license. After taking into consideration all necessary materials, the detaining authority came to the conclusion that petitioner Ishverbhai Shanabhai Machhi was engaged in activity of disposing of essential commodities like wheat, rice, sugar, kerosene etc., by false card reference and preparing bogus bills. The petitioner - Balabhai Raijibhai Machhi abated the above said activities of petitioner Ishverbhai Shanabhai Machhi in disposing of blue kerosene in open market by getting higher rates. The detaining authority came to the conclusion that the activities of the petitioners were prejudicial to the maintenance of public distribution system of essential commodities and were required to be prevented forthwith. Though a criminal case came to be filed against both the petitioners under Sections 3 and 7 of Essential Commodities Act, 1955 before competent court where the petitioners came to be released on bail. The petitioners also committed grave breach of the license and control orders. In view of the detaining authority, though the license issued to the petitioner Ishverbhai Shanabhai Machhi was suspended and a criminal case also came to be filed against the petitioners, but those steps were not sufficient to prevent the illegal activities of the petitioners and hence, the orders against each petitioner for detention under P.B.M. Act as aforesaid from 14th October, 2004 were passed by the detaining authority and those two orders passed against each of the petitioners are subject matter of these two petitions.

5. Learned advocate Mr.B.K.Oza for the petitioners in both the petitions and learned AGP Mr.H.M.Prachchhak for respondents No.3, 4 and 5 in Special Civil Application No.15158 of 2004 and learned AGP Mrs.H.B.Punani for respondents No.3, 4 and 5 in Special Civil Application No.15163 of 2004, the learned Additional Standing Counsel Mr.Shaikh for respondents No.1 and 2 in both the petitions were heard at length. The affidavit-in-reply filed by Mr.A.K.Ganguli under Secretary in the Department of Consumption Affairs Food and Public Distribution, New Delhi, the affidavit-in-reply filed by the detaining authority and the affidavit-in-reply filed by Deputy Secretary to the Government of Gujarat, Food Civil Supplies and Consumption Affairs Department, Sachivalaya, Gandhinagar filed in both the petitions, were taken into consideration.

6. Out of various grounds urged on behalf of the petitioners in both the petitions and opposed and controverted by learned AGPs and learned Additional

Standing Counsel for the Central Government, it appears that both the petitions can be disposed of and examined on the issue whether the right of the petitioners as enshrined in Article 22(5) of the Constitution of India is violated.

7. Both the matters are required to be viewed within the scope as to whether, after awareness of the detaining authority to vital facts, necessary documents were supplied to the detenu. The right of detenu as to prefer representation against the detention is recognized by Article 22(5) of the Constitution of India. This right of representation on the part of detenu is recognize to the extent of effective representation. Therefore, it is a proposition of law that awareness of the detaining authority as to certain facts relevant for reaching subjective satisfaction to detain a person must not only be reflected in the grounds but for effective representation by the detenu, necessary copies of the documents must be supplied to him at the time of execution of the order of detention.

8. The controversy and vital point which learned advocate for petitioner sought to make is in respect of certain documents not supplied to the detenu. It is an admitted fact that apart as described in the grounds of detention, in the prosecution filed against each of the petitioners, both of them are released on bail by the court competent on filing an application for bail. According to the learned advocate for the petitioners, though a copy of the surety bonds offered by each of the petitioners was taken into consideration by the detaining authority and the copy of the same was also supplied, however, a copy of the application of bail preferred by each of the petitioners and the orders passed by the court competent to release both of them on bail has not been supplied to the detenu affecting the right under Article 22(5) of the Constitution of India for preferring effective representation.

9. On going through the papers, it is found that in both the cases, a copy of the application for bail and the order passed thereon appears not to have been placed before the detaining authority nor copies of the same are supplied to any of the detenus. Heavy reliance is placed by the learned advocate for the petitioner upon two decisions of the Apex Court, one in the matter of Abdul Sathar Ibrahim Manik Vs. Union of India and others, reported in AIR 1991 S.C. 2261 and second in the matter of M. Ahamedkutty Vs. Union of India and another, reported in (1990) 2 S.C.C. 1.

10. In the decision of Abdul Sathar Ibrahim Manik, the Apex Court after considering many decisions, set down following six conclusions as under:-

"Having regard to the various above-cited decisions on the points often raised we find it appropriate to set down our conclusions as under:

(1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

(2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can be questioned before a higher Court.

(3) If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority, it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was aware of the fact that the detenu was in actual custody.

(4) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenu cannot affect the detenu's right of being afforded a reasonable opportunity guaranteed under Article 22(5) when it is clear that the authority has not relied or referred to the same.

(5) When the detaining authority has merely referred to them in the narration of events and

has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction the failure to supply these documents, may, in certain cases depending upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts and the grounds, which aspect can be examined by the Court.

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu."

11. In both these petitions, we are concerned with conclusion No.6 arrived at by the Apex Court wherein it has been expressly ruled that even in case where detenu was released on bail and was at liberty at the time of passing the order of detention, the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu. Meaning thereby that even in a case when detenu was on bail, the application preferred by the detenu for releasing him on bail and the order passed thereon is a vital material must be taken into consideration by the detaining authority and non-supply of such copies to the detenu, therefore, undoubtedly affects the right of detenu to make effective representation.

12. In the matter of M. Ahamedkutty (supra), in paragraphs No.19 and 20, the Apex Court has observed that the detenu has right to be furnished with the grounds of detention along with the documents so referred to or relied on. If there is failure or even delay in furnishing those documents it would amount to denial of the right to make and effective representation guaranteed under Article 22(5). The Apex Court has further observed that it was immaterial whether the detenu already knew

about their contents or not. The question of demanding the documents was also wholly irrelevant and the infirmity in that regard was violative of Article 22(5). The Apex Court has further observed that an application for bail filed by the detenu and the order passed thereon constitutes vital materials, non-consideration of such vital materials by the detaining authority or non-supply copies thereof to detenu would be violative of Article 22(5) and continued detention would become illegal.

13. In the above view of the matter, when in both the petitions, the detaining authority neither took into consideration application of bail filed by each detenu and orders passed thereon nor supplied copies to the detenu, the further detention of each of the petitioners in both the petitions would be illegal. The orders challenged in each of these two petitions, therefore, are required to be quashed and set aside on this ground alone.

14. In the result, in view of the above discussion, both the petitions bearing Special Civil Application No.15158 of 2004 and Special Civil Application No.15163 of 2004 are allowed. The orders passed by the detaining authority on 13th October, 2004 against each of the petitioners of both these petitions under powers conferred upon him by virtue of Section 3(2) of the Prevention of Black Marketing Commodities Act, 1980 are hereby quashed and set aside.

The petitioner Ishverbhai Shanabhai Machhi of Special Civil Application No.15158 of 2004 is at present detained at Junagadh District Jail, therefore, the Jail Superintendent, Junagadh District Jail is ordered to set at liberty the petitioner forthwith, if he is not required to be detained for any other purpose. Rule is made absolute in Special Civil Application No.15158 of 2004. Direct service is permitted, today.

The petitioner Balabhai Raijibhai Machhi of Special Civil Application No.15163 of 2004 is at present detained at Rajkot District Jail, therefore, the Jail Superintendent, Rajkot District Jail is ordered to set at liberty the petitioner forthwith, if he is not required to be detained for any other purpose. Rule is made absolute in Special Civil Application No.15163 of 2004. Direct service is permitted, today.

Office is also directed to send the writ of this order to the respective Jail Authorities forthwith.

[J. R. VORA,J.]

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